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MOTION TO ADVANCE

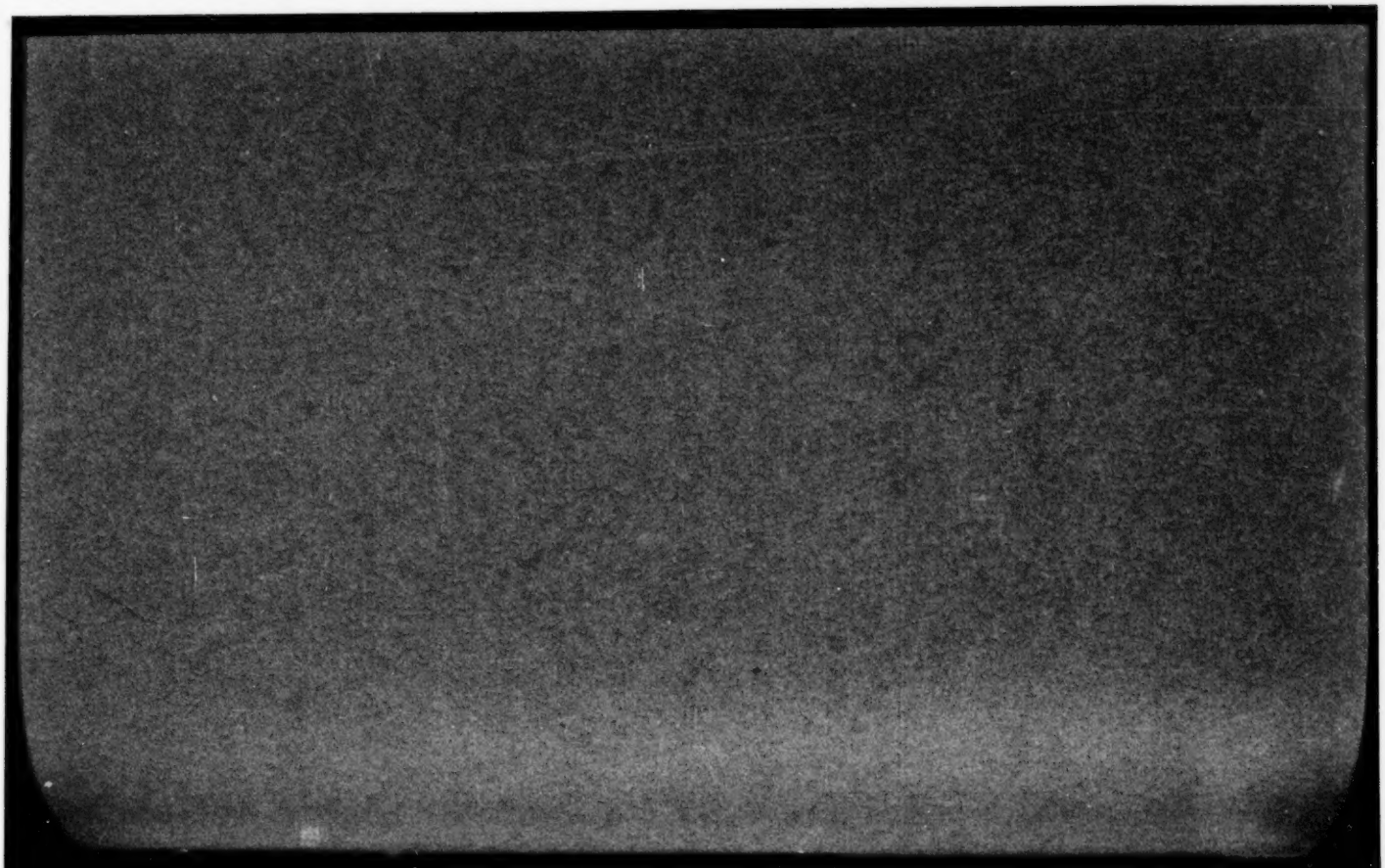
SUPREME COURT OF THE UNITED STATES

October Term, 1926

No. 492

FOX RIVER PAPER COMPANY, PATTEN PAPER COMPANY, LIMITED, APPLETON WOOLEN MILLS, ET AL.,
PLAINTIFFS IN ERROR
vs.
RAILROAD COMMISSION OF WISCONSIN,
DEFENDANT IN ERROR

SUPREME COURT OF THE UNITED STATES



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In error to the Supreme Court of the State of Wisconsin.

Now come the above named plaintiffs in error and the above named defendant in error and move that the above entitled cause be taken up out of its order on the docket and advanced for hearing on the calendar of this Court, and in support of said motion make part hereof, and respectfully submit the statement of the matter involved with the reasons for the application assigned by the plaintiffs in error on the one hand and by the defendant in error on the other, which are hereunto annexed.

Dated December 24, 1926.

John F. Kluwin,
Edward J. Dempsey,
Attorneys for Plaintiffs in Error.

Moses Hooper,
Counsel for Plaintiffs in Error.

Herman L. Ekern, Attorney General,
C. A. Erikson, Deputy Attorney General,
Suel O. Arnold, Assistant Attorney General,
Attorneys for Defendant in Error.

STATEMENT OF MATTER INVOLVED

This cause is pending on a writ of error to the Supreme Court of the State of Wisconsin. On January 2, 1926, the defendant in error recovered a judgment in the Circuit Court for Dane County, in the State of Wisconsin, against the plaintiffs in error dismissing the complaint of the plaintiffs herein without costs in an action brought to compel the Railroad Commission of the State of Wisconsin to take jurisdiction of an application made by the plaintiffs in error for a permit

to rebuild a dam across the Fox River at the city of Appleton, Wisconsin. Appeal was taken to the Supreme Court of the State of Wisconsin, and that Court, being evenly divided, the judgment of the Circuit Court for Dane County was, under the rules of the Supreme Court, affirmed.

REASONS FOR APPLICATION ASSIGNED BY PLAINTIFFS IN ERROR

The plaintiffs in error own a water power on the Fox River at Appleton, Wisconsin, maintained by a wooden dam built in 1877-8 (R. 10) (c)). Parties building the dam supposed they had permission of the state to build the same (R. 11-12 (e)), but the present owners think they were mistaken.

The dam is across the lower Fox River, a river navigable in law, but not in fact, at or near the dam site (Map in Record, P. 14-15). The War Department and the dam owners wish that the dam be rebuilt on account of insecurity of the same arising from decay. (R. 13 (1)).

Plans have been submitted to, and approved by, the War Department conditioned that the owners secure permission of the State for rebuilding the same.

The state statute respecting permission to rebuild is as follows:

"31.07. APPLICATIONS FOR PERMITS TO OPERATE AND MAINTAIN EXISTING DAMS. Any person, firm, corporation or municipality desiring a permit to operate and maintain a dam constructed in or across navigable waters without legislative permission prior to the tenth day of July, 1915, shall file with the commission a written application therefor

setting forth: (1 . . . .), (2 . . . .), (3 . . . .), (4 . . . .), (5 . . . .), (6 . . . .).

"31.08. HEARING. Upon receipt of an application under section 31.07 procedure shall be had substantially as required by section 31.06, and if the commission shall find that such operation and maintenance does not materially obstruct existing navigation or violate other public rights and will not endanger life, health or property, a permit is hereby granted to the applicant.

"31.09. PROPOSALS TO ACCOMPANY APPLICATIONS. . . . . and each applicant for a permit to construct, operate and maintain a dam for any other purpose whatsoever, which is capable of developing fifty theoretical horse power or more available for fifty per cent of the time throughout the year, shall file with his application for a permit, in addition to the requirements of section 31.05 or section 31.07, as the case may be, the following proposals: (1 . . . .), (2 . . . .), (3) That the permit, if granted shall be granted and accepted subject to the express condition that the state of Wisconsin, if it shall have the constitutional power, or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property of the grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition of all dams, works, buildings, or other structures or equipment, used and useful under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided

in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all right to any further compensation."

The plaintiffs in error challenge the clause (3) of Section 31.09 as not in harmony with the Federal Constitution, Articles V and XIV.

The plaintiffs in error have made application to the Railroad Commission for a certificate pursuant to section 31.08 omitting the proposal (3). The Commission has held that such petition entitles plaintiffs in error to action under the Wisconsin Water Power Law, except that it does not contain the agreement required by said subsection (3), and for that reason has refused to act upon the petition and has dismissed the same (Rec. 7-8 21-22).

The Circuit Court of Dane County in an action in the nature of an appeal from such determination of the Railroad Commission, sustained such determination. (R. 26-27-28). On appeal from this determination of the Circuit Court of Dane County, the Supreme Court (The Court of last resort) of the State of Wisconsin has, by an evenly divided court, permitted the determination of said Circuit Court to stand (R. 28).

Thereby it has come about that either these plaintiffs in error must agree to surrender valuable constitutional rights to property, or the rebuilding of said dam must await the determination of plaintiff's in error contention herein.

Besides, the development of very many valuable water powers in the State of Wisconsin is being delayed and deterred by the enforcement of said subsection (3) by the Railroad Commission of Wisconsin,

and the interest of water power owners, various municipalities in the State of Wisconsin, and also the interests of the State of Wisconsin require that the issues raised on this appeal be determined as speedily as may be possible.

Finally, government improvements which have been constructed by the United States in the Fox River below the dam in question in aid of navigation, are placed in jeopardy by reason of the unsafe condition of the dam which plaintiffs in error desire to rebuild.

John F. Kluwin,
Edward J. Dempsey,
Attorneys for Plaintiffs in Error.

Moses Hooper,
Counsel for Plaintiffs in Error.

REASONS FOR APPLICATION ASSIGNED BY DEFENDANT IN ERROR

First. Defendant in error while denying that the enforcement of Sec. 31.09 (3), Wisconsin Statutes, will deprive plaintiff in error or any other water power owners in the State of Wisconsin of any constitutional rights, agrees with plaintiff in error that the speedy determination of this case is of great importance to the State of Wisconsin, and the owners of water powers in such state.

Second. Defendant states that the Railroad Commission of Wisconsin is hampered in the enforcement of Sec. 31.09 (3), Wisconsin Statutes, while any doubt exists as to its constitutionality.

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